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No. 87-1346

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

BONITO BOATS, INC.,

*Petitioner,*

v.

THUNDER CRAFT BOATS, INC.,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of Florida**

## BRIEF OF AMICUS CURIAE CERTIFIED AUTOMOBILE PARTS ASSOCIATION IN SUPPORT OF RESPONDENT

MELVIN C. GARBOW
*(Counsel of Record)*
JAMES F. FITZPATRICK
ROSS E. GETMAN

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

## QUESTION PRESENTED

May a state, consistent with the Federal Copyright Act and the Supremacy Clause of the Constitution, prohibit a method of copying artistically crafted, useful, three dimensional works, when the Copyright Revision Act of 1976 authorizes a federal copyright for some such works and directs that all rights prohibiting the copying of works "within the subject matter of copyright" be governed exclusively by that Act?

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iv |
| INTEREST OF AMICUS CURIAE | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 6 |
| I. SECTION 301 OF THE FEDERAL COPYRIGHT ACT DESCRIBES THE KINDS OF STATE LAWS PREEMPTED BY THE ACT. THIS DESCRIPTION PRECISELY FITS THE FLORIDA MOLD STATUTE. | 6 |
| A. The Florida Law Provides Rights Equivalent to Those Accorded by the Federal Copyright Act. | 7 |
| B. The Florida Law Deals with Works Which Are "Fixed in a Tangible Medium of Expression." | 9 |
| C. The Florida Law Deals with "Works of Authorship" Which Are "Within the Subject Matter of Copyright." | 10 |
| 1. Vessel Hulls and Components Are "Sculptural Works" and Thus "Within the Subject Matter of Copyright." | 10 |
| 2. A Sculptural Work May Have a Utilitarian Function, as a Boat Hull or Component. | 12 |
| II. PREEMPTION EXTENDS TO GENERAL SUBJECT MATTER CATEGORIES OF THE FEDERAL COPYRIGHT ACT WITHOUT REGARD TO WHETHER PARTICULAR ITEMS WITHIN THE CATEGORIES MEET ALL THE TESTS FOR COPYRIGHT PROTECTION. | 13 |





| | |
|---|---|
| III. THE LEGISLATIVE HISTORY OF THE FEDERAL COPYRIGHT ACT CONFIRMS THAT PREEMPTION WAS TO EXTEND TO ALL WORKS WITHIN THE SUBJECT MATTER OF COPYRIGHT WITHOUT REGARD TO WHETHER COPYRIGHT PROTECTION WAS ACTUALLY AVAILABLE FOR ALL SUCH WORKS. | 19 |
| A. The Congressional Reports Indicate That Congress Intended To Establish a Bright Line Between State and Federal Rights. | 19 |
| B. Congress Rejected a Preemption Test Based on Copyright Availability. | 21 |
| C. Congress Did Not Intend That the Design Separability Condition for Registration Should Restrict Federal Preemption as to Sculptural Works. | 23 |
| D. Congress Determined That Useful Articles Should Be Protected from Copying Only If They Were Worthy of a Copyright. Otherwise They Were To Be in the Public Domain. | 25 |
| E. Congress Intended That the States Should Not Be Able To Ban the Copying of Sculptural Works on a Theory of Design "Misappropriation." | 27 |
| CONCLUSION | 29 |
| APPENDIX A | |
| APPENDIX B | |

## TABLE OF AUTHORITIES


CASES: Page

*Arnold* v. *Silvercraft*, 259 F. Supp. 733 (S.D.N.Y. 1966) ..... 17

*Brandir Int'l, Inc.* v. *Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) ..... 17

*Carol Barnhart Inc.*, v. *Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985) ..... 17

*Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) ..... 15,22

*Decorative Aides Corp.* v. *Staple Sewing Aides Corp.*, 497 F. Supp. 154 (S.D.N.Y. 1980), *aff'd*, 657 F.2d 262 (2d Cir. 1981) ..... 16,23

*Del Madera Properties* v. *Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987) ..... 8,28

*Esquire, Inc.* v. *Ringer*, 414 F. Supp. 939 (D.D.C. 1976), *rev'd*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) ..... 18

*Financial Information, Inc.* v. *Moody's Investor Serv.*, 808 F.2d 204 (2d Cir. 1986) ..... 8

*Gay Toys, Inc.* v. *Buddy L. Corp.*, 703 F.2d 970 (6th Cir. 1983) ..... 17

*Goldstein* v. *California*, 412 U.S. 546 (1973) ..... 15,16,28

*Kieselstein-Cord* v. *Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) ..... 17

*Mayer* v. *Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523 (S.D.N.Y. 1985) ..... 8

*Mazer* v. *Stein*, 347 U.S. 201 (1954) ..... 12,13,23,24

*Mills Music Inc.* v. *Snyder*, 469 U.S. 153 (1985) .. 21,24

*Sears, Roebuck & Co.* v. *Stiffle Co.*, 376 U.S. 225 (1964) ..... 15,22




## Table of Authorities Continued


Page

*Vacheron & Constantin-LeCoultre Watches* v. *Benrus Watch Co.*, 155 F. Supp. 932 (S.D.N.Y. 1957), *aff'd in part and rev'd in part on other grounds*, 260 F.2d 637 (2d Cir. 1958) ..... 17

*Vermont Castings* v. *Evans Products Company*, 215 U.S.P.Q. 758 (1981) ..... 23

STATUTES:

Copyright Revision Act of 1976,

17 U.S.C. § 101 ..... 9,11

17 U.S.C. § 102 ..... 4,11,14

17 U.S.C. § 103 ..... 11

17 U.S.C. § 106 ..... 7

17 U.S.C. § 301 ..... 2,3,6,7

17 U.S.C. § 405 ..... 14

17 U.S.C. § 408(a) ..... 14

90 Stat. 2541 (1976) ..... 11

Cal. Bus. & Prof. Code § 17300(a) (West 1987) ... 13

Fla. Stat. Ann. § 559.94 (West 1988) ..... 3,13

Mich. Comp. Laws § 445.622 (Supp. 1988) ..... 13

LEGISLATIVE MATERIALS:

S. Res. 53, 86th Cong., 1st Sess. (1959), 105 Cong. Rec. 1168 (January 27, 1959) ..... 21

S. Res. 340, 86th Cong., 2d Sess. (1960), 106 Cong. Rec. 339 (1960) ..... 21

H.R. 11947, 88th Cong., 2d Sess., 110 Cong. Rec. 16341 (July 20, 1964) ..... 22,23

S. 3008, 88th Cong., 2d Sess., 110 Cong. Rec. 16260-61 (July 20, 1964) ..... 22,24

*Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess. (September 1964) ..... 6,21,22

*Copyright Law Revision, Part 5: Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. (September 1965) ..... 22,23

**Table of Authorities Continued**


| | Page |
|---|---|
| *Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 89th Cong., 1st Sess. (May 1965) | 23 |
| S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) | *passim* |
| H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) | *passim* |
| H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) | 26,27 |
| PERIODICALS: | |
| Brown, *Design Protection: An Overview*, 34 U.C.L.A. 1341 (1987) | 7 |
| Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. 1070 (1977) | 7 |
| Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 Minn. L. Rev. 707 (1983) | 7 |
| MISCELLANEOUS: | |
| Letter from Michael M. Uhlmann, Assistant Attorney General to Hon. Hugh Scott, U.S. Senate, February 18, 1976, *reprinted in* 122 Cong. S2044 (daily ed. February 19, 1976) | 25,26 |
| Letter from Thomas E. Kauper, Assistant Attorney General, Antitrust Division, to Hon. Hugh Scott, U.S. Senate, February 13, 1976, *reprinted in* 122 Cong. Rec. S2042-43 (daily ed. February 19, 1976) | 27 |


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## BRIEF OF AMICUS CURIAE CERTIFIED AUTOMOBILE PARTS ASSOCIATION IN SUPPORT OF RESPONDENT

The Certified Automobile Parts Association ("CAPA"), as *amicus curiae*, submits this brief in support of the holding below that the Florida mold statute is preempted by federal law.[1]

### INTEREST OF AMICUS CURIAE

The Certified Automobile Parts Association was formed in order to ensure that replacement parts for the repair of damaged automobiles meet the highest quality standards for fit, finish and corrosion protec-

[1] This brief is filed with the consent of the parties.

tion. It was created by, and is comprised of, numerous automobile insurance companies, distributors of replacement parts, and consumer groups.

In particular, CAPA's purpose is to ensure that high quality non-original equipment manufacturer (non-OEM) replacement parts are available to the American public. Such non-OEM parts are generally copied from OEM parts which are not the subject of patents or registered copyrights. The use of non-OEM replacement parts promotes competition, savings and safety. The members of CAPA estimate that such competition results in savings to consumers of hundreds of millions of dollars per year in the form of lower insurance premiums.

CAPA is concerned that if the Florida mold statute is upheld in this case, similar state laws will be used to prevent the manufacture and sale of non-OEM crash parts which are copied from OEM parts that are unprotected by either the federal patent or copyright laws.

## STATEMENT OF THE CASE

The Florida Supreme Court ruled that the Florida Mold Law was preempted by the federal patent laws. In so ruling, the Florida Supreme Court did not consider whether the Florida Mold Law was also preempted by Section 301 of the Copyright Revision Act of 1976 ("Federal Copyright Act" or "Act"). 17 U.S.C. § 301. Section 301 directs that rights to prohibit the copying of certain works, which may include useful articles such as vessel hulls or component parts of a vessel, are to be governed exclusively by the Federal Copyright Act and no person is entitled to any equivalent right under the laws of any state.



Certain amici curiae supporting petitioner have addressed the Federal Copyright Act issues and argued that Section 301 does not preempt state plug molding statutes. *See* Brief of Amici Curiae Orange County Patent Law Association and the Los Angeles Patent Law Association, at 15 *et seq.* Although the copyright issues were not expressly addressed below, they are within the scope of the preemption question under federal law and the Supremacy Clause of the Constitution on which *certiorari* was granted and present an alternative basis on which to sustain the judgment of the Florida Supreme Court.

## SUMMARY OF ARGUMENT

The Florida mold statute extends a limited right against copying to any manufacturer of a "vessel hull or component part of a vessel." Fla. Stat. Ann. § 559.94 (West 1988). The statute accords these manufacturers the exclusive right to "duplicate" such vessels or component parts according to a common industrial method known as plug molding. The statute also accords such manufacturers the exclusive right to sell a vessel or component reproduced by the plug molding method.

The state statute runs afoul of the preemption provision of the Federal Copyright Act and is therefore unconstitutional under the Supremacy Clause of the United States Constitution. Section 301 of that Act provides that no person is entitled to a right against copying or "equivalent right" under the "statutes of any State" with regard to "works of authorship" that "come within the subject matter of copyright" as denominated in the Act. 17 U.S.C. § 301. Vessels and components, whose copying is forbidden by the Florida statute, are works of authorship that fall within

the "sculptural works" subject matter category of the Federal Copyright Act. 17 U.S.C. § 102. Accordingly, the Florida statute, in providing such state copyright protection, is explicitly preempted by Section 301 of the Federal Copyright Act.

It may well be, as certain amici assert, that most vessel hulls or component parts of vessels do not meet all of the standards for federal copyright protection. But preemption is not to be determined hull by hull or component by component, after an assessment of the intricate design separability and other criteria requisite for federal copyright protection. That particularized approach would lead to the conflict among courts and uncertainty among authors and copiers which Congress urgently sought to avoid. Congress intended that preemption be determined by a straightforward assessment of whether a state law applies to general categories of works, such as "sculptural works," which the federal act explicitly embraces as the "subject matter of copyright." If the state law applies to such categories, as does the Florida law, then the state law is preempted.

In more than a decade of legislative deliberation with respect to the Federal Copyright Act, Congress carefully crafted what are now the governing federal/state boundaries for intellectual property protection. Section 301 represents "one of the bedrock provisions of the bill." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 129 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 112 (1975).

> In that Section, Congress intended:
>
> "to preempt and abolish any rights under the common law or statutes of a State that are



> equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in *Section 301 is intended to* be stated in the clearest and most unequivocal language possible, so as to *foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection."* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975). (Emphasis added.)

Pursuant to its desire to establish a clear demarcation between allowable state and federal protection against copying, Congress decided that federal preemption of rights against copying would apply to all works within the "general subject matter" of the copyright law, without regard to whether a particular work meets all the precise federal standards for copyright protection. The Congressional reports state:

> "As long as a work fits within one of the *general subject matter categories* of sections 102 and 103, the bill preempts the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130-31 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975). (Emphasis added.)

Congress rejected a proposal that would have made preemption decisions as to state laws forbidding the copying of particular works turn on whether federal copyright protection was "available" or "not available" for such works.[2] Instead, Congress directed preemption of state laws prohibiting the copying of any works within the general scope of the federal law without regard to the particular characteristics of such works. The Florida law falls squarely within the ban of Section 301 of the Federal Copyright Act and is therefore preempted by federal law.

## ARGUMENT

### I. SECTION 301 OF THE FEDERAL COPYRIGHT ACT DESCRIBES THE KINDS OF STATE LAWS PREEMPTED BY THE ACT. THIS DESCRIPTION PRECISELY FITS THE FLORIDA MOLD STATUTE.

Section 301 of the Federal Copyright Act sets out the broad areas of intellectual property protection where federal law is to be supreme. Preemption is demanded of state laws which:

1. extend "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106"; and
2. deal with "works of authorship" which are
   a. "fixed in a tangible medium of expression"; and
   b. "come within the subject matter of copyright as specified by sections 102 and 103." 17 U.S.C. § 301(a).

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[2] *See Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess. 18 (September 1964).



All copyright matters in this realm are to be "governed exclusively by this title." *Id.* And "no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state." *Id.*

As discussed below, the Florida statute trenches on these provisions of Section 301.[3]

#### A. The Florida Law Provides Rights Equivalent to Those Accorded by the Federal Copyright Act.

The Florida mold statute clearly satisfies the first requirement of copyright preemption by affording state rights "equivalent" to copyright. Section 106, referenced in Section 301, gives the owner of a federal copyright "the exclusive rights" to "reproduce the copyrighted work in copies" and "to distribute copies . . . of the copyrighted work to the public by sale." 17 U.S.C. § 106. Thus, Section 106 makes it unlawful for anyone but the copyright owner to reproduce by any means (including plug molding) or to sell such works as are protected by the Federal Copyright Act. The reproduction of an article eligible

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[3] Commentators have recognized that state laws such as the one at issue here are preempted. *See, e.g.*, Brown, *Design Protection: An Overview*, 34 U.C.L.A. 1341, 1381 (1987) ("Design is within the copyright subject matter of 'pictorial, graphic, and sculptural works.' Therefore, state law cannot forbid the copying of designs"); Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 Minn. L. Rev. 707, 725, n.88 (1983) (under *Goldstein* state protection of such works is preempted because "Congress has in fact drawn a balance with respect to industrial designs"); Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. 1070, 1090-96 (1977) (state protection of the design of useful articles is preempted).

for protection under the Federal Copyright Act by the molding technique described by the Florida law would unquestionably violate Section 106.

Without doubt, therefore, the Florida law conveys rights at least "equivalent," and to a degree identical, to "the exclusive rights within the general scope of copyright as specified by Section 106" in that it prohibits anyone from reproducing by one means (plug molding), or to sell, works protected by the state law.[4] The fact that the Florida law does not prohibit reproduction by every possible means is irrelevant under Section 301. Equivalency to "*any*" Section 106 right is the test under Section 301.[5]

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[4] The Congressional reports indicate that Section 301 "is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 132 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 116 (1975). The Florida statute does not address any of these activities.

[5] That a state claim may require an element of proof in addition to those necessary to prove copyright infringement does not avoid preemption unless the additional element makes the nature of the action qualitatively different from a claim for infringement under the Federal Copyright Act and thus not equivalent. *See, e.g., Mayer* v. *Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985) ("That extra element . . . must be one which changes the nature of the action so that it is *qualitatively* different from a copyright infringement claim"); *accord Del Madera Properties* v. *Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987). Here, both the federal and Florida statute prohibit the same act—copying. The state statute prohibits copying by a particular means, while the federal statute prohibits copying by any means. *See, e.g., Financial Information, Inc.* v. *Moody's Investor Serv.*, 808 F.2d 204, 208 (2d Cir. 1986) (state law claims based on "misappropriation" are preempted).



**B. The Florida Law Deals with Works Which Are "Fixed in a Tangible Medium of Expression."**

The Florida law deals with works which "are fixed in a tangible medium of expression" as that term is used in Section 301 of the Federal Copyright Act and defined in 17 U.S.C. § 101. Section 101 provides:

> "[a] work is fixed in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration . . . ." 17 U.S.C. § 101.

A "vessel hull or component part of a vessel" clearly falls within this description.

This is a matter of considerable significance to a preemption analysis, for Congress, by adopting the "fixed-in-a-tangible-medium-of-expression" standard in Section 301, meant to

> "accomplish a fundamental and significant change in the present law. Instead of a dual system of 'common law copyright' for unpublished works and statutory copyright for published works, which has been the system in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is 'created' or, as that term is defined in section 101, when it is 'fixed in a copy or phonorecord for the first time.' *Common law copyright protection for works coming within*

*the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection* and between both of the forms of legal protection and the public domain.

• • •

*On the other hand, section 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been 'fixed in any tangible medium of expression.'* Examples would include choreography that has never been filmed or notated, an extemporaneous speech, 'original works of authorship' communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 129, 131 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 112-15 (1975). (Emphasis added.)

Vessel hulls and components are not among the class of works Congress saved from preemption.

### C. The Florida Law Deals with "Works of Authorship" Which Are "Within the Subject Matter of Copyright."

#### 1. Vessel Hulls and Components Are "Sculptural Works" and Thus "Within the Subject Matter of Copyright."

The mold statute meets the last condition for preemption under Section 301 because the "vessel



hull[s] or component part[s] of a vessel" which are the subject of the Florida law are "works of authorship" that "come within the subject matter of copyright" as specified by Sections 102 and 103 of the Federal Copyright Act.

Section 102 of the Act is the provision directly relevant here.[6] 17 U.S.C. § 102. That Section is headed: "Subject matter of copyright: In general."[7] The section deals with "works of authorship" and "*include*[*s*]" as subject matter "categories" the following:

> "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include the following categories:
>
> • • •
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> (5) . . . sculptural works."[8] (Emphasis added.)

Congress generally described the "sculptural works" category in Section 101 so as to "include . . . three-dimensional works of . . . *applied* art." 17 U.S.C. § 101. (Emphasis added.)

Vessel hulls and components which are subject to the Florida statute and presented in this litigation are, of course, aesthetically designed to appeal to the public and comprise "three dimensional works of . . .

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[6] Section 103 of the Act deals with "compilations and derivative works" and is not relevant here. 17 U.S.C. § 103.

[7] The heading was enacted by Congress, and was not added merely by the compiler of the code. *See* 90 Stat. 2541, 2544 (1976); 17 U.S.C. § 102.

[8] Section 101 states that "The terms 'including' and 'such as' are illustrative and not limitative." 17 U.S.C. § 101.

applied art." For the convenience of the Court we have included in Appendix B to this brief a number of dramatic examples of nautical applied art that would be subject to the Florida mold law. These examples include ornamentally carved vessel hulls and figureheads traditionally incorporated as component parts of the bow structures of sailing vessels. Applied artistry is equally well expressed in the sleek, sculptural lines of modern motor powered boats as in these examples of sail and human powered boats.

**2. A Sculptural Work May Have a Utilitarian Function, as a Boat Hull or Component.**

That a sculptural work is intended to be mass produced as a utilitarian device does not remove it from the illustrative "categories" of things which are the "subject matter of copyright." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 54 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 53 (1975). This Court taught in *Mazer* v. *Stein*, 347 U.S. 201 (1954), that a work otherwise within the subject matter of the copyright statute (there the 1909 Act) did not lose its eligibility for federal copyright protection merely because it was reproduced as a utilitarian device.

In enacting the Copyright Act of 1976, Congress chose to follow *Mazer* v. *Stein*, and particularly acknowledged in Section 101 that the category of "sculptural works" could include as a subcategory: "works of artistic craftsmanship," which in turn could include as a further subcategory: a "useful article." Many sculptural works which are works of artistic craftsmanship and useful articles are registered annually in the federal copyright register. Included are such things as lamps, slippers, belt buckles, ash trays,



and candlesticks.[9] *See, e.g., Mazer*, 347 U.S. at 219, 221 (Douglas, J., concurring). All such works are "the subject matter of copyright."

## II. PREEMPTION EXTENDS TO GENERAL SUBJECT MATTER CATEGORIES OF THE FEDERAL COPYRIGHT ACT WITHOUT REGARD TO WHETHER PARTICULAR ITEMS WITHIN THE CATEGORIES MEET ALL THE TESTS FOR COPYRIGHT PROTECTION.

Amici supporting the petitioner assert that "sculptural works" which are also "useful articles" can only draw protection from the Federal Copyright Act if their designs incorporate sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the articles. They claim that boat hulls "would be expected to not have" such features and that there is no issue of preemption except with respect to a particular vessel hull or component that meets every test of federal copyright protection. Brief of Amici Curiae Orange County Patent Law Association and the Los Angeles Patent Law Association, at 17-19.[10]

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[9] Federal copyright registrations are listed at the Library of Congress by author, artist or designer—not by type of work. Thus, it has not been possible to search the tens of thousands of copyrights registered in order to catalog for this brief all the various examples of sculptural works which have been registered under the Act and perforce whose copying could not properly be regulated by state copyright statutes such as those, for example, of Florida, Fla. Stat. Ann. § 559.94(1)(a) (applying to "vessel hull[s] and "component part[s] of a vessel") or Michigan, Mich. Comp. Laws § 445.622 (Supp. 1988) (applying to "any manufactured item") or California. Cal. Bus. & Prof. Code § 17300(a) (West 1987) (applying to "any manufactured item").

[10] Amici cite no support for their expectation. We assert a

To be sure, in order to be *registrable* under the Federal Copyright Act the design of a particular useful article must incorporate certain sculptural features that can be identified separately from the utilitarian aspects of the article and the design must meet the Act's other requirements of registration, such as being "original" and not being in the public domain, etc. *See* 17 U.S.C. § 102; 17 U.S.C. § 405.[11] And for purposes of argument we may assume that many specific vessel hulls and component parts of vessels will not

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contrary expectation based on the highly sculptural vessel hulls and components in the appendix to this brief. But in any event the separability characteristics go to an article's eligibility for copyright protection under the Act and not the "subject matter of copyright" under Section 301.

Although they argue against preemption in respect of Petitioner's particular boat hull, the Orange County Patent Law Association and the Los Angeles Patent Law Association acknowledge in their amicus brief that:

> "The subject matter of federal copyright is very broad, and includes many types of three-dimensional works which might be duplicated by plug molding." *Id.* at 12.

They further acknowledge that a "particular boat hull feature" may be "copyrightable subject matter" but urge a limiting construction of the state statute so as to avoid the obvious federal preemption. *Id.* at 18-19. Amici overlook the language of the Florida statute which forbids copying not only of a "vessel hull" but of a "component part of a vessel."

[11] Under the Act, *registration* of a copyright claim is not a condition of copyright protection. 17 U.S.C. § 408(a). We use the word "registrable" in this brief, however, in order to avoid the ambiguity in the word "copyrightable" and as a shorthand for the phrase "eligible for copyright protection under the statute." The word "copyrightable" is ambiguous in that it can be used in both a constitutional and statutory sense.



meet the separability test and are not protected from copying under the Act (although some surely do and are).

But that a particular vessel hull or a particular component part of a vessel might not be *registrable* because of deficiencies in its design is irrelevant to the preemptive reach of Section 301. Congress intended that preemption was to be based on general categories of works, not specific items. Some sculptural works are eligible for copyright protection and some not. But constitutional determinations of state law preemption are not to be made hull by hull or component by component. *All* sculptural works are within one of the "categories" described by Section 102 as "within the subject matter of copyright" and thus within the preemptive scope of Section 301. Section 301 voids all state efforts to restrict copying of objects generally within any of the "categories" specified by Section 102 as illustrative of the "subject matter of copyright," and that includes *all* objects of a type that can be described as "sculptural works."

The protection afforded by the Florida mold law is precisely what this Court forbade in *Sears/Compco*: "when an article is unprotected by a . . . copyright, state law may not forbid others to copy that article." 376 U.S. at 237. Even in *Goldstein*, where this Court upheld a state copyright law, it ruled that where Congress has established standards for federal protection of a certain "category" of articles, those standards describe not only which "articles in this particular category Congress wished to protect, *but which configurations it wished to remain free*" and state efforts to "prevent the copying of articles which did not meet the requirements for federal protection . . . necessar-

ily gave way under the Supremacy Clause of the Constitution." 412 U.S. at 569-70. (Emphasis added.) It is only with regard to categories "[where] Congress has drawn no balance . . . [but] has left the area unattended" that states are free to act. *Id.* at 570. "[S]culptural works" is not such a category. *See Decorative Aides Corp.* v. *Staple Sewing Aides Corp.*, 497 F. Supp. 154, 160 (S.D.N.Y. 1980), *aff'd*, 657 F.2d 262 (2d Cir. 1981) (state law forbidding copying of uncopyrightable drapery header preempted under Supremacy Clause).

A "categories" approach to preemption is demanded under the principles established in these cases and the structure and purpose of the Federal Copyright Act. Otherwise, there will be two systems of copyright protection providing conflicting rights: a federal system of copyright providing limited protection for those particular sculptural works which meet the federal tests of registrability and as many as 50 state systems of copyright providing perhaps perpetual protection for sculptural works which do not meet those federal standards. Producers of original works, copiers and the courts will be thrust into a maelstrom of confusion, the whole notion of uniform federal standards will be in shambles, and any realm of free competition will disappear.

It often is difficult to determine whether a particular sculptural work will be *registrable*, especially if it is a useful article. The cases considering the registrability on the federal copyright register of particular sculptural works are difficult to harmonize and the results are difficult to predict. Artistic beauty and design "separability" do indeed lie in the eye of the judicial beholder. The cases are replete with instances



of qualified trial courts being reversed by appellate panels on abstract issues of artistic design separability, and of appellate panels sharply dividing on matters of artistic impression that escape convenient grasp or black letter expression. *Brandir Int'l, Inc.* v. *Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (split decision; majority, noting difficulty of framing test, finds that bicycle rack based on wire sculpture could not be registered); *Kieselstein-Cord* v. *Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (split decision; majority reverses district court and determines that decorative belt buckles could be registered); *Esquire, Inc.* v. *Ringer*, 414 F. Supp. 939 (D.D.C. 1976), *rev'd*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (district court, noting "elusive semantic dispute," finds modernistic lamp could be registered; court of appeals reverses).

One court gave voice to those difficulties when it characterized the useful article presented, which it determined to be registrable, as "on the razor's edge of copyright law." *Kieselstein-Cord*, 632 F.2d at 990. Thus courts have found a toy airplane[12] registrable, a mannequin not[13]; a belt buckle registrable,[14] a watch face[15] not; an antique telephone[16] registrable, and a

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[12] *Gay Toys, Inc.* v. *Buddy L. Corp.*, 703 F.2d 970 (6th Cir. 1983).

[13] *Carol Barnhart Inc.* v. *Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985).

[14] *Kieselstein-Cord* v. *Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

[15] *Vacheron & Constantin-LeCoultre Watches* v. *Benrus Watch Co.*, 155 F. Supp. 932 (S.D.N.Y. 1957), *aff'd in part and rev'd in part on other grounds*, 260 F.2d 637 (2d Cir. 1958).

[16] *Arnold* v. *Silvercraft*, 259 F. Supp. 733 (S.D.N.Y. 1966).

modernistic lamp[17] not. Of particular note, all these cases arose *after* consideration of registrability by the Register of Copyrights. How much more difficult the task if, for Section 301 preemption purposes, the question of registrability had to be answered without prior consideration by the Copyright Office at he Library of Congress.

According to the Amici supporting petitioner, a state law would be preempted where a belt buckle or toy plane is involved but not preempted where a modernistic lamp is at issue. But Congress expressly said that preemption was *not* to turn on such particularized decisions of registrability. Rather, preemption was required when works were within a "general subject matter" of copyright such as sculptural works. Boat hulls and components certainly fall within this general category. Congress intended the preemption analysis to go no further. A rule that preemption turns on the factually intensive characteristics of the design of a particular article would result in innumerable conflicts among the state courts and between the state and federal courts and produce unmanageable chaos in the realm of intellectual property protection.

[17] *Esquire, Inc.* v. *Ringer*, 591 F.2d 796 (D.C. Cir. 1978).



## III. THE LEGISLATIVE HISTORY OF THE FEDERAL COPYRIGHT ACT CONFIRMS THAT PREEMPTION WAS TO EXTEND TO ALL WORKS WITHIN THE SUBJECT MATTER OF COPYRIGHT WITHOUT REGARD TO WHETHER COPYRIGHT PROTECTION WAS ACTUALLY AVAILABLE FOR ALL SUCH WORKS.

### A. The Congressional Reports Indicate That Congress Intended To Establish a Bright Line Between State and Federal Rights.

In enacting the "subject-matter-of-copyright" test in Section 301 Congress sought to create an unambiguous, bright line that would enable the courts conveniently to separate the parochial concerns of the states to protect one or another local industry, from the predominating concerns of the federal government to encourage both innovation and competition. Congress intended that federal preemption should be "unequivocal" as to "general subject matter categories" of the Act. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130-31 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975). Congress intended to "preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975).

In doing so, Congress drew a "bright line" of preemption:

> "The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible so as to foreclose any conceivable misinterpretation of its unqualified intentions that Congress

> shall act preemptively and to avoid the development of any vague or borderline areas between State and Federal protection." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975).

Congress implemented this "bright line" approach by insisting that preemption decisions turn on a determination of whether a work falls within the general categories of works addressed by the federal law. Congress determined that preemption would *not* turn on specific decisions of whether particular works are registrable:

> "*As long as a work fits within one of the general subject matter categories of sections 102 and 103* [*e.g.* "sculptural works"] the bill prevents the States from protecting it *even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain . . . .*" H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130-31 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975). (Emphasis and brackets added.)

The Congressional Reports repeatedly stressed that as to works within one of the general subject matter categories of the Act federal law governs exclusively:

> "Regardless of when the work was created and whether it is published or unpublished, disseminated or undisseminated *in the public domain or copyrighted under the Federal Statute*, the States cannot offer it protection equivalent to copyright." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130-31 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 114 (1975). (Emphasis added.)



The position urged by Amici Orange County Patent Law Association and the Los Angeles Patent Law Association would entirely frustrate the objective of Congress to substitute "a single Federal system for the present anachronistic, uncertain, impractical and highly complicated dual system." H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 113 (1976); S. Rep. No. 94-473, 94th Cong., lst Sess. 129 (1975).

**B. Congress Rejected a Preemption Test Based on Copyright Availability.**

The drafters deliberately chose the "within-the-subject-matter-of-copyright" test and rejected the approach advanced by amici supporting the petitioner. An early draft of the proposed Copyright Act prepared in 1963 proposed that federal law would govern exclusively with respect to "*works for which copyright protection is available*" and explicitly preserved state law: "[*w*]*ith respect to material for which copyright protection is not available.*"[18] Following this Court's

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[18] The Copyright Office, directed by Congress, made a number of studies preparatory to the general revision of the Copyright law, and prepared a Preliminary Draft of legislation which eventually was enacted as the Copyright Act of 1976. *See* S. Res. 53, 86th Cong. 1st Sess. (1959), 105 Cong. Rec. 1168 (January 27, 1959); S. Res. 340, 86th Cong. 2d Sess., 106 Cong Rec. 339 (1960). The Copyright Office transmitted the Preliminary Draft to the House Committee on the Judiciary which published it for public comment. *Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess. 1-36 (September 1964). *See Mills Music Inc.* v. *Snyder*, 469 U.S. 153, 159-60 (1985) (discussing the special significance of this

decisions in *Sears/Compco* in 1964, the drafters changed the test for preemption to what now appears in Section 301. Under the new test first set out in H.R. 11947[19] and S. 3008[20] which was carried forward and enacted in Section 301 of the Federal Copyright Act, federal law preempts with respect to all works "within the subject matter of copyright." This change codified in the copyright area the *Sears/Compco* test which requires preemption with respect to all works within the subject matter of patents, whether or not

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early drafting history).

Section 19 of the Preliminary Draft read:

> "(a) On and after the effective date of this act, all rights in the nature of copyright in *works for which copyright protection is available* under sections 1 and 2, whether created before or after that date and whether published or unpublished, shall be governed exclusively by this title. Thereafter, no person shall be entitled to copyright, to literary or intellectual property rights, or to any equivalent legal or equitable right in any such work under the common law or statute of any State.
>
> (b) Nothing in this title shall annul or limit any rights or remedies under the law of any State:
>
> (1) *With respect to unpublished material for which copyright protection is not available* under sections 1 and 2; . . ."
>
> *Copyright Law Revision, Part 3: Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess. 18 (September 1964). (Emphasis added.)

[19] H.R. 11947, 88th Cong., 2d Sess., 110 Cong. Rec. 16341 (July 20, 1964) (introduced by Rep. Celler).

[20] S. 3008, 88th Cong., 2d Sess., 110 Cong. Rec. 16260-61 (July 20, 1964) (introduced by Sen. McClellan).



those works were actually entitled to a patent. It was the express intention of the drafters to extend preemption to the design of useful articles.[21] Preemption no longer turns on the eligibility of a particular item for copyright protection.[22]

**C. Congress Did Not Intend That the Design Separability Condition for Registration Should Restrict Federal Preemption as to Sculptural Works.**

Congress likewise did not intend that the design separability conditions it prescribed for copyright registrability in Section 101 should restrict "the subject matter of copyright" or otherwise limit the clear federal preemption it desired under Section 301. Congress added the design separability condition merely to ensure that copyright registration of sculptural works would continue to follow the test of *Mazer* v. *Stein*, 347 U.S. 201 (1954). H.R. Rep. No. 94-1476,

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[21] *See* Statement of Barbara A. Ringer, Assistant Register of Copyright (August 7, 1964) published in *Copyright Law Revision, Part 5: 1964 Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. 166 (September 1965) (preemption extends to industrial designs); *see also Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 89th Cong., 1st Sess. 84, 232-33 (May 1965) (explaining reason for change in language).

[22] The district court in *Vermont Castings* v. *Evans Products Company*, 215 U.S.P.Q. 758 (1981) found, erroneously we submit, no preemption in respect of a useful article because the particular work in question there did not meet all the tests of copyright registrability. *See* 215 U.S.P.Q. at 762-63. *But see Decorative Aides Corp.* v. *Staple Sewing Aides Corp.*, 497 F. Supp. 154, 160 (S.D.N.Y. 1980), *aff'd*, 657 F.2d 262 (2d Cir. 1981). The court in *Vermont Castings* appears to have been unaware of the overriding purpose of Section 301 and the specific legislative history.

94th Cong., 2d Sess. 54 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 53 (1975).

Both the House and Senate bills under consideration in 1975 contained the same language: Section 301 preempted as to "works that come within the subject matter of copyright as specified by sections 102 and 103." Section 102 listed "sculptural works" as among the "categories" of "subject matter of copyright." And Section 101 defined "sculptural works" in relevant part as "three dimensional works of . . . applied art." There was nothing in the section about design separability. This structure reflected legislative developments which had been in place for nearly a decade and mimicked the original House[23] and Senate bills[24] introduced in the 88th Congress in 1964.[25] From 1964 through 1975, none of the House nor the Senate bills contained any reference to design separability in regard to sculptural works.

The language in regard to design separability as a condition to the registration of sculptural works first appeared in the House bill of 1976 immediately prior to passage of the law. The House added this language at the very last moment when it determined to reject the Senate proposal, contained in Title II of the Senate bill, for the creation of a hybrid patent-copyright system covering useful articles that did not meet the

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[23] H.R. 11947, 88th Cong., 2d Sess., 110 Cong. Rec. 16341 (July 20, 1964) (introduced by Rep. Celler).

[24] S. 3008, 88th Cong., 2d Sess., 110 Cong. Rec. 16260-61 (July 20, 1964) (introduced by Sen. McClellan).

[25] *See Mills*, 469 U.S. at 159-60 (language in proposed copyright legislation at issue similarly remained unchanged during 1964-1975 period).



then existing requirements for patent or copyright protection.

The Conference Committee accepted the House version with respect to these matters and both Houses enacted the Copyright Act in accordance with the House version. The legislative reports establish that Congress added the design separability language not to limit the "subject matter of copyright" under Section 301 but rather to ensure that copyright registration of sculptural works which were also useful articles would continue to follow the test of *Mazer* v. *Stein*.[26] Congress did not intend thereby to retreat from its repeatedly expressed intent that Section 301 should preempt broadly and unambiguously as to all "sculptural works" as had been set forth in House and Senate bills for a decade.

**D. Congress Determined That Useful Articles Should Be Protected from Copying Only If They Were Worthy of a Copyright. Otherwise They Were To Be in the Public Domain.**

Congress' intent to preempt state copyright laws as to all works within the subject matter of copyright, whether registrable or not, is further evidenced by Congress' rejection of the proposal which would have granted limited protection from copying to useful articles that were not otherwise eligible for protection under the copyright or patent laws. Title II of the Senate bill would have created a hybrid form of federal statutory monopoly—between copyrights and design patents—for the designs of useful articles that did not reflect the degree of creativity or authorship as would have entitled them either to a patent or

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[26] H. Rep. No. 94-1476, 94th Cong., 2d Sess. 54 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 53 (1975).

copyright.[27] The Department of Justice, in a letter received and discussed during the floor debates, severely criticized these proposals to create "a new type of monopoly protection."[28]

The House of Representatives accepted the Department of Justice criticism. The House-passed bill refused to extend protection against copying to useful articles which failed to meet the standards for copyright protection under the Federal Copyright Act.[29] The Conference Committee accepted the House version and Congress enacted the statute without the challenged provisions.[30] This enactment evidences a clear congressional intent that useful articles which did not meet the standards of copyright protection

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[27] *See* S. Rep. No. 94-473, 94th Cong., 1st Sess. 39-47 (1975) (reprinting provisions relating to the Protection of Ornamental Designs of Useful Articles).

[28] Letter from Michael M. Uhlmann, Assistant Attorney General to Hon. Hugh Scott, U.S. Senate, February 18, 1976, *reprinted in* 122 Cong. Rec. S2044 (daily ed. February 19, 1976). The letter stated in pertinent part:

> "Enactment of Title II would likely substantially increase the cost to the public for many useful articles. The copier may perform a number of economically useful functions which deserve encouragement. He may simply produce the useful article at a lower cost. He may achieve wider distribution. He may couple the design with some other useful article. He may do none of these, but by merely providing competition he may force lower profit margins and greater efficiency." *Id.*

[29] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 1-46 (1976).

[30] H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 82 (September 29, 1976) (Conference Committee accepted House amendment deleting the language that would have granted a form of monopoly to such articles).



were to remain in the public domain, free for everyone to copy.

### E. Congress Intended That the States Should Not Be Able To Ban the Copying of Sculptural Works on a Theory of Design "Misappropriation."

One last insight into Congress' intent to preempt broadly without ambiguity is evidenced by an amendment to the proposed Copyright Act which took place on the eve of enactment. The Florida Mold Law is a so-called "misappropriation" statute.[31] Section 301(b) of the bill reported out of the Senate Judiciary Committee would have exempted from preemption and preserved state remedies for "rights against misappropriation not equivalent to any of such exclusive rights [of Section 106]."[32]

The Department of Justice strongly criticized the "allowance of monopolies based on the theory of 'misappropriation.' "[33] In particular, the Department of Justice urged the elimination of the misappropriation language from the legislation because:

> "This unjust enrichment theory could be used broadly to prohibit the copying of uncopyrighted published materials.

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[31] *See* Brief of Amici Curiae Orange County Patent Law Association at 15; Brief for the Petitioner at 10 ("In effect the copier misappropriates the original manufacturer's developmental effort and investment.")

[32] *See* S. Rep. No. 94-473, 94th Cong., 1st Sess. 20 (1975).

[33] Letter from Thomas E. Kauper, Assistant Attorney General, Antitrust Division, to Hon. Hugh Scott, U.S. Senate, February 13, 1976, *reprinted in* 122 Cong. Rec. S2042-43 (daily ed. February 19, 1976).

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> Any copying of copyrightable subject matter that has not been federally protected could be prohibited under the amorphous theory of 'misappropriation.'
>
> • • •
>
> *The preemption sought by the omnibus Copyright Act revision bill would be nullified by paragraph (3).*" (Emphasis added.)[34]

In direct response to the Department of Justice criticism, Congress struck the misappropriation language, fearing that it would be interpreted to preserve state power over "misappropriation."[35] In short, Congress did not want the states to do precisely what Florida here has sought to do.[36]

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The end result of this prolonged legislative deliberation was a congressional decision that *all* matters of design protection for sculptural works were "within the subject matter of copyright" and were to be governed exclusively by federal law. To borrow from *Goldstein*, Congress in the Federal Copyright Act fully attended to the copying of all such designs and left no room for state regulation. 412 U.S. at 570.

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[34] *Id.*

[35] H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 78-79 (September 29, 1976) (Conference Committee accepted House amendment deleting the language).

[36] Prohibitions of copying under state laws barring "misappropriation" are preempted. *See, e.g., DelMadera*, 820 F.2d at 977; *Financial Information*, 808 F.2d at 208; and *Mayer*, 601 F. Supp. 1534-35.



## CONCLUSION

For the reasons stated above, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

MELVIN C. GARBOW
(*Counsel of Record*)
JAMES F. FITZPATRICK
ROSS E. GETMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

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# APPENDIX

# APPENDIX A

## STATUTES INVOLVED

**Florida Mold Law, Fla. Stat. Ann. § 559.94.**

Duplication of vessel parts; action for injunctive relief against illegal duplication or against sale of illegally duplicated vessel parts.

(1) As used in this section, the term:

(a) "Direct molding process" means any direct molding process in which the original manufactured vessel hull or component part of a vessel is itself used as a plug for the making of the mold, which mold is then used to manufacture a duplicate item.

(b) "Mold" means a matrix or form in which a substance or material is shaped.

(c) "Plug" means a device or model used to make a mold for the purpose of exact duplication.

(2) It is unlawful for any person to use the direct molding process to duplicate for the purpose of sale any manufactured vessel or component part of a vessel made by another person without the written permission of that other person.

(3) It is unlawful for any person to knowingly sell a vessel hull or component part of a vessel duplicated in violation of subsection (2).

(4) Any person who suffers injury or damage as the result of a violation of the provisions of this section may bring an action in circuit court for an injunction prohibiting such violations. In addition, such person shall be entitled to actual damages incurred as a result of such violation and to reasonable attorney's fees and costs.

(5) The provisions of this section apply only to vessel hulls or component parts of vessels duplicated through use of molds made on or after July 1, 1983."

**Copyright Revision Act of 1976, 17 U.S.C. § 301.**

§ 101. DEFINITIONS

"As used in this title [17 USCS §§ 101 et seq.], the following terms and their variant forms mean the following:

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"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

§ 102. SUBJECT MATTER OF COPYRIGHT: IN GENERAL

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;



(6) motion pictures and other audiovisual works; and
(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedures, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phone records;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phone records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individuals images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 301. PREEMPTION WITH RESPECT TO OTHER LAWS

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter

of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyrights as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of a State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

## APPENDIX B